obstacle has been opposed to an intelligent adjustment of charges according to economic conditions.

MAY A CRIMINAL PENALTY BE SHIFTED? — Whether one upon whom a criminal penalty has been imposed for an act of his own regarded as criminal, may shift the burden of his fine by a civil action against another primarily responsible was squarely presented by a recent English case. *R. Leslie (Ltd.)* v. *Reliable Advertising and Addressing Agency (Ltd.)*, [1915] 1 K. B. 652.[1] The plaintiffs, moneylenders, had been fined for the statutory misdemeanor of sending circulars to an infant,[2] because the defendant agency in addressing envelopes had, contrary to its contract, negligently included a minor's name. The moneylenders were allowed only nominal damages, it being considered contrary to the public interest that one so sentenced should not bear both his fine and costs. The question decided seems never to have arisen in this country. English authority is not abundant, but the question was discussed by way of *dicta* in two cases. The first, in 1834, took the view, in a suit against the managing editor of a newspaper by the proprietor who on his account had been fined for libel, that there was no right of compensation for an injury of this character.[3] The second, at a much later date,[4] attempted to introduce a qualification to this general rule against shifting a penalty. In this case a trooper brought an action of deceit for personal injuries sustained while innocently participating at the defendant's solicitation in the Jameson Raid in violation of the Foreign Enlistment Act.[5] Neither criminal prosecution nor fine was involved, but one judge was of opinion that no public policy precluded one who had been convicted of a crime of which *mens rea* was not an element from receiving full indemnity.[6] Prior to the principal case, this suggested exception does not seem to have been questioned, for in two subsequent cases persons convicted of the minor statutory misdemeanor of selling impure meat or fish succeeded in recovering the amount of their fines against their vendors on warranty without the legality being questioned.[7]

This dividing line of the English decisions allowing recovery over of fines only in the case of lesser crimes, at first sight seems analogous to the distinction in the law of torts as to contribution between tortfeasors. Although as a rule there is said to be no right of contribution, it is now somewhat generally established that there may be a legal adjustment of the loss unless the wrong was conscious, intentional, or immoral.[8]

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[1] A statement of the case appears in this issue of the REVIEW, p. 705.

[2] BETTING AND LOANS (INFANTS) ACT, 1892 (55 & 56 Vict., ch. 4), § 2. MONEYLENDERS ACT, 1900 (63 & 64 Vict., ch. 51), § 5.

[3] Colburn *v.* Patmore, 4 Tyrw. 677, 1 C. M. & R. 73. The case was decided, however, on a point in pleading. *Cf.* Poplett *v.* Stockdale, 1 R. & M. 337 (1825), in which Best, C. J., said, "It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law."

[4] Burrows *v.* Rhodes, [1899] 1 Q. B. 816; see 13 HARV. L. REV. 215, 226.

[5] 1870 (33 & 34 Vict., ch. 90), § 11.

[6] See Burrows *v.* Rhodes, *supra*, 831, per Kennedy, J.

[7] Crage *v.* Fry, 67 J. P. 240; Cointat *v.* Myham, [1913] 2 K. B. 220.

[8] See 12 HARV. L. REV. 176, containing an explanation of the leading case of Merryweather *v.* Nixan, 8 T. R. 186.

The purpose of the general rule, which recognizes that the denial of contribution may, as among the tortfeasors, result in unfairness, is to create a deterrent upon this sort of conduct.[9] Thus, for intentional conversion,[10] defamation,[11] or knowingly maintaining a danger,[12] one jointly responsible cannot apportion his loss. But there may be contribution where there has been an unintentional conversion,[13] or where one has been held responsible owing to some legal doctrine, such as partnership,[14] *respondeat superior*,[15] or the virtual suretyship of a municipal corporation for the safe condition of the streets.[16]

The principal case would seem more nearly to resemble the latter classification, where according to the later English cases involving crimes, as in the law of tortfeasors, the burden may be passed along or divided. The plaintiffs were innocent, in fact, and *mens rea* was not an element of the misdemeanor.[17] Had the plaintiff been injured through loss of trade or in some such other collateral way on account of his conviction, there would therefore have been no objection to recovery. The only damages claimed, however, were the fine and costs, and these the court on account of the policy of the criminal law refused to recognize. Such a conclusion, involving as it does a rejection of the later English exception permitting the shifting of criminal penalties in the case of the lesser crimes, seems proper. There being a strong policy against minors receiving moneylenders' advertisements at all, the object of the legislature would be better effectuated by leaving the results of criminal liability where they fall. If the plaintiff could shift the pecuniary loss to the defendant, an additional safeguard against this evil would be simultaneously destroyed, for the incentive to each moneylender to see to it personally that none of his circulars reached minors would be lessened. Of course, it is possible that a subcontractor or agent might likewise have violated the statute, and have been fined himself. To shift the principal's fine to him also, however, would merely serve to accumulate the deterrents of criminal and civil liability upon one person presumably of less responsibility. Without regard to justice among the parties, the rule to prevail should be the one most likely to prevent the occurrence of the acts the statute intended to obviate. This policy of the criminal law would seem to require that a

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[9] See Thweatt's Adm'r *v.* Jones, Adm'r, 1 Rand. (Va.) 328, 333.

[10] Peck *v.* Ellis, 2 Johns. Ch. (N. Y.) 131; Boyd *v.* Gill, 19 Fed. 145; Davis *v.* Gilham, 44 Oh. St. 69; Boyer *v.* Bolender, 129 Pa. 324.

[11] Arnold *v.* Clifford, 2 Sumn. (U. S.) 238; Atkins *v.* Johnson, 43 Vt. 78. Libel stands on peculiar grounds for historical reasons, it being conclusively regarded as knowingly committed. See Kennedy, J., in Burrows *v.* Rhodes, *supra*, p. 833, referring to Colburn *v.* Patmore, *supra:* "The plaintiff though actually ignorant was legally cognizant of the publication of the libel."

[12] Spaulding *v.* Oakes, 42 Vt. 343.

[13] Adamson *v.* Jarvis, 4 Bing. 66; Thweatt's Adm'r *v.* Jones, Adm'r, *supra;* Acheson *v.* Miller, 2 Oh. St. 203.

[14] Wooley *v.* Batte, 2 C. & P. 417; Pearson *v.* Skelton, 1 M. & W. 504; Horbach *v.* Elder, 18 Pa. 33.

[15] Bailey *v.* Bussing, 28 Conn. 455.

[16] Lowell *v.* Boston & Lowell R., 23 Pick. (Mass.) 24; Westfield *v.* Mayo, 122 Mass. 100; *cf.* Armstrong County *v.* Clarion County, 66 Pa. 218. See 28 HARV. L. REV. 636.

[17] The fact that nominal damages were allowed in the principal case corroborates this view. The opinion of the court in claiming this was a crime involving *mens rea* seems to have been an unsuccessful attempt to reconcile the result desired with the previous English test.

punishment, whether in the form of fine or imprisonment, should always remain fixed with him upon whom it was imposed.[18] The ordinary test of the law as to contribution or indemnity in the case of other elements of damage is inapposite to criminal penalties, because of the stronger policy of repression in the latter.

POSSIBLE INTERESTS IN ONE'S NAME OR PICTURE. — "The law is utilitarian. It exists for the realization of the reasonable needs of the community." [1] So it is not surprising that with the advent of modern photography and the growth of a certain type of unscrupulous journalism the law has come to recognize to a limited extent an individual's right of privacy, a right not to have his personal affairs subjected to public comment and scrutiny without his consent.[2] Yet the courts have handled the matter very unsatisfactorily.[3] A recent case in New York evidences the confusion of thought which pervades the entire subject. The plaintiff secured from an actress the exclusive right to the use of her picture on posterettes. The defendant thereafter with the consent of the actress published and sold posterettes bearing the same picture. The court refused an injunction on the ground that the statutory right of privacy was a purely personal right, and therefore not subject to assignment.[4] *Pekas Co.* v. *Leslie*, 52 N. Y. L. J. 1864 (N. Y. Sup. Ct.).

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[18] If, in a particular statute, it is not intended to preclude the adjudication of justice between the parties, a clause may be inserted declaring that any fine imposed under its provisions may be recovered in damages. See the English SALE OF FOOD AND DRUGS ACT (1875), § 78. In the absence of such a clause, it should be presumed that no such recovery over was intended.

[1] Ames, "Law and Morals," 22 HARV. L. REV. 110.

[2] Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68; Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Douglas *v.* Stokes, 149 Ky. 506, 149 S. W. 849; Munden *v.* Harris, 153 Mo. App. 652, 134 S. W. 1076; Edison *v.* Edison Polyform, etc. Co., 73 N. J. Eq. 136, 67 Atl. 392; Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193; WIGMORE, SUMMARY OF THE PRINCIPLES OF TORTS, § 148; COOLEY, TORTS, 3 ed., p. 364. In some states the right has been expressly recognized by statute. NEW YORK CONSOL. LAW, ch. 6, §§ 50, 51; CAL. PENAL CODE, § 258. It can be waived by consent or voluntary submission to public scrutiny. Corliss *v.* Walker, 64 Fed. 280. See Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 199, 50 S. E. 68, 72. And it must give way if in conflict with the freedom of the press. Moser *v.* Press Pub. Co., 59 N. Y. Misc. 78, 109 N. Y. Supp. 963. See Pavesich *v.* N. Eng. Life Ins. Co., 122 Ga. 190, 204, 50 S. E. 68, 74.

[3] The right of privacy, whether recognized or not, is generally considered a personal right. Relief granted: Pavesich *v.* N. Eng. Life Ins. Co., *supra;* Foster-Milburn Co. *v.* Cherin, *supra;* Douglas *v.* Stokes, *supra.* Relief refused: Roberson *v.* Rochester Box Co., 171 N. Y. 538, 64 N. E. 442; Henry *v.* Cherry & Webb, 30 R. I. 13, 73 Atl. 97. But a few courts grant relief on the ground of the violation of a right of property analogous to one's right in the products of his mind, such as unpublished letters, sketches, etc. Munden *v.* Harris, *supra.* Edison *v.* Edison Polyform, etc. Co., *supra.* And there is some judicial expression to the effect that both a personal right and a property right are involved. See the dissenting opinion of Gray, J., in Roberson *v.* Rochester Box Co., 171 N. Y. 538, 561, 564; also Colt, J., in Corliss *v.* Walker, *supra*, p. 282.

[4] NEW YORK CONSOL. LAWS, ch. 6, § 51, provides: "Any person whose name, portrait, or picture is used for advertising purposes or for purposes of trade without written consent first obtained . . . may maintain an equitable action to prevent and restrain